No. 303.

Brief of McIntosh for D.

Office Supreme Court U. S.
FILED
OCT 7 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

Filed Oct. 7, 1899.

OCTOBER TERM, 1899.

No. 303.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.

VS.

THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals Fourth District.

Brief for the Defendant in Error in Reply to Brief of the Counsel for the Plaintiff in Error.

J. R. McINTOSH,
Counsel for Defendant in Error.

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learned counsel for the plaintiff in error have served
th a copy of their brief resisting my motion in this cause,
ith a notice that they will, on the 10th day of October,

A. D. 1899, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, ask leave of the court to file their brief, a reply to my brief filed in this cause on the 22d day of May, 1899.

I take it that they expect me to make some reply, and might misconstrue my action were I to decline to do so. But for that, I would not make reply, for their brief is the same argument made before his Honor Judge Simonton, upon application for a writ of error to his order appointing commissioners in this cause, which was overruled; (See his opinion of the 9th of November, 1898, Vol. 90 Fed. Rep, 211,) and the same argument made before the Circuit Court of Appeals for the 4th District, where my motion to dismiss was sustained by that honorable court, and an opinion handed down by his Honor Judge Morris. (See page 95 of the printed record in this cause).

I respectfully refer this honorable court to the opinions of Judges Simonton and Morris as my argument in behalf of the motion, which the labored argument of the counsel for the plaintiff in error does not answer; also, to § 1946 of the Code of North Carolina of 1883, which is not printed in the brief of the counsel for plaintiff in error (of course, by oversight), which provides as follows:

"If said company, at the time of appraisement, shall pay into court the sum appraised by the commissioners, then under that event, the said company may enter, take possession of and hold said lands, notwithstanding the pendency of appeals, and until the final judgment rendered on said appeal or appeals."

And, in that connection, to the opinion of the Supreme Court of North Carolina, in the case of *Commissioners* v. *Cook*, 86 N. C., 18, viz:

"The proceeding for the condemnation of land, for work for public improvements, is intended to be summary and direct, and its useful purpose in facilitating the proposed work would be defeated if the progress of the work could be arrested by

al whol.y needless in this incipient stage for the protec-
any right or interest of the unwilling landowner. The
f the prompt method of procedure in such cases is to
he delay and interruptions incident to an ordinary
and promote the completion of the authorized public
ement.

e case is not in principle distinguishable from that of
v. *R. R. Co*, 83 N. C., 420; and as was then decided,
ow hold that the appeal of the defendant is premature
st be dismissed."

to call the attention of the court to the fact that this
ling was instituted in the State Court of North Carolina
11th day of April, 1898, and thus, as declared by the
e Court of that State, the spirit and purpose of the
s of North Carolina have, by the delays resorted to by
t in error, been postponed already for eighteen months!

, to the case of *Hendrick* v. *Railroad*, 98 N. C., 431, and
d Co. v. *Warren*, 92 N. C., 620; and also to the case of
Tenn., Va. & Ga. R. R. v. *Southern Tel. Co.*, 112 U. S.
06, et seq., where Mr. Chief Justice Waite, in delivering
inion of the court (page 310) said: "The courts of the
States, on the removal of the proceedings from the
e Court, were clothed with no greater power in the
es, than the courts of the State would have pos-
if their jurisdiction had been preserved. It follows
s an appeal from the Probate Court to the State
or to the Supreme Court would not have operated to
t the Telegraph Company from taking possession of the
ty appropriated, and erecting its wires, pending the
, the supersedeas on the writ of error from this Court to
rcuit Court of the United States should be limited in the
ray. This provision of the statute is by no means an
l one, and was intended to prevent delays in the progress
ublic work while the parties were litigating in the higher
as to the correctness of a preliminary assessment of

compensation to be paid an owner of property taken for the public use according to the forms of law."

Which theory is in line with that expressed by the Supreme Court of North Carolina in the case of *Commissioners* v. *Cook*, *supra*.

The learned counsel for the plaintiff in error, on page 17 of their brief, say: "It should be understood, however, that the plaintiff in error is not appealing from an order appointing commissioners to fix compensation." They are appealing to this Honorable Court from the judgment of the Circuit Court of Appeals, which was an appeal to that court from the order of his Honor, Judge Simonton, appointing commissioners.

As stated by his Honor, Judge Morris, in his opinion, *supra*:

"The Supreme Court of North Carolina held, in a similar proceeding to condemn a right of way for the construction and operation of lines of telegraph along the defendants' railroad, that no appeal was allowable from the order adjudging that the petitioner was *entitled to the right of way demanded, and appointing commissioners* to ascertain and report the compensation to be paid to the defendant railroad as damages for the condemned property." (Italics ours.)

I will not now make reply to so much of the brief of the counsel for the plaintiff in error as criticises the action of the Circuit Court in sustaining the demurrer of the Telegraph Company to the answer of the Railroad Company, for the reason that none of those matters will now be considered by this Honorable Court, but respectfully refer the Court to my brief filed in this cause on the 22d day of May, 1899.

This Honorable Court has no jurisdiction in this matter if the order appealed from was not a final one, and the law is:

"If it is apparent on the record that the appellate court has no jurisdiction on appeal, it will dismiss it without any motion for that purpose, even if both parties oppose it." *Bruner* v. *United States*, 11 How., 163; *Sampson* v. *Walsh*, 24 How., 207;

n v. *Petty*, 16 Wall., 338; *Burnham* v. *First National* U. S. App., 485; *Latham's App.*, 9 Wall., 185.

pinion of this Court, in the case of *Luxton* v. *North idge Co.*, 147 U. S. 337–341, I submit, is conclusive of tter; to it I respectfully invite the attention of the

Respectfully submitted,

J. R. McINTOSH,
Counsel for Defendant in Error.